IN THE SUPREME COURT

Appeal from the Court of Appeals

White, P.J., Cavanagh, Saad, Hoekstra, O'Connell, Owens and Cooper, JJ (Special Panel)

Jansen, P.J., Neff and Zahra, JJ. (Hearing Panel)

THE ESTATE OF PATRICIA SWANN,
Deceased, by ERIC A. BRAVERMAN,
Successor Personal Representative,

Plaintiff-Appellee

-v-

GARDEN CITY HOSPITAL, a/k/a
GARDEN CITY HOSPITAL OSTEOPATHIC,
a Michigan corporation,

Defendant-[Putative] Appellee

Docket No. 134446

and

JOHN H. SCHAIRER, D.O, GARY YASHINSKY, M.D., ABHINAV RAINA, M.D., and PROVIDENCE HOSPITAL AND MEDICAL CENTERS, INC.,

Defendants-Appellants

Docket No. 134445

BRIEF ON APPEAL—APPELLEE

(In Response to Brief of Garden City Hospital filed December 17, 2007)

ORAL ARGUMENT REQUESTED

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ATTACHMENTS TO THIS BRIEF

Attachment 1 *Braverman v Wm Beaumont Hosp* (Mich App No 268106, released August 28, 2007)

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STATEMENT OF QUESTIONS PRESENTED

Issue I: Where suit for medical malpractice/wrongful death is filed by a successor personal representative within two years of the date of appointment, and less than three years after the period of limitation would otherwise have run, did the circuit court correctly deny summary disposition based on the statute of limitations?

Plaintiff-Appellee Successor Personal Representative answers "yes".

The Court of Appeals hearing panel unanimously answered "yes".

The circuit court answered "yes".

Issue II: Assuming such an issue is properly raised, did the circuit court correctly permit suit by a successor personal representative to proceed, where notice of intent per MCL 600.2912b was properly and timely served by counsel for the estate at the behest of the original personal representative?

Plaintiff-Appellee Successor Personal Representative answers "yes".

The Court of Appeals Special Panel unanimously answered "yes".

The circuit court had no opportunity to address this question.

COUNTERSTATEMENT OF FACTS

This "true" appellee's brief responds to the disguised appellant's brief filed by Garden City Hospital ("GCH") on December 17, 2007. The Court will note that GCH's brief, on its face, has all the earmarks of an appellant's brief—it has a Statement of Facts and Proceedings, MCR 7.306(A) and MCR 7.212(C)(6), rather than the requisite Counterstatement of Facts per MCR 7.306(A) and MCR 7.212(D)(3)(b) required when an appellee does not accept the facts as summarized by the appellant, presents "Standards of Review", MCR 7.306(A) and MCR 7.212(C)(7), instead of Counterstatements thereof per MCR 7.306(A) and MCR 7.212(D)(2) (again, a legitimate appellee's brief must either accept the standards of review posited by the appellant or present a counterstatement of the standard), and additionally GCH carefully and deliberately omits any discussion of its failure to preserve its Issue II contrary to MCR 7.306(A) and MCR 7.212(C)(7).

GCH's statement of facts also omits key information. Rather than produce a second counterstatement of facts in conformity with MCR 7.306(A) and MCR 7.212(D)(3)(b), appellee Braverman, successor personal representative, incorporates by reference the Counterstatement of Facts in his prior Appellee's Brief on Leave Granted herein, filed December 13, 2007 in response to the Brief on Appeal of the "Providence Defendants". Only additional facts specific to GCH's failure to preserve Issue II are presented here.

Specific Facts Concerning GCH's Failure to Preserve Issue II

On August 15, 2006, the Court of Appeals issued its published decision, *Braverman v Garden City Hosp*, 272 Mich App 72; 724 NW2d 285 (2006) ("*Braverman I*", Apx 36a-50a), affirming denial of summary disposition with respect to the statute of limitations issue, but vacating and remanding in part on the issue of whether the successor personal representative, in

order to fulfill the notice requirements of MCL 600.2912(b), had to issue a new notice of intent to sue. The hearing panel exercised its discretion to consider the notice of intent issue as to the Providence Defendants, but concluded that GCH had not only failed to preserve such an issue but had waived the issue, 272 Mich App at 84 n. 16 and 87-88 (Apx 43a and 45a).

Judge Zahra, dissenting in part, would have held that none of the appellants preserved any issue relating to the validity of the notice of intent and that there was no justification for reviewing the issue in order to declare a conflict, 272 Mich App at 89 ff and n. 1 (Apx 48a).

Invoking MCR 7.215(J)(2), a majority of the hearing panel went on to declare a conflict with *Verbrugghe v Select Specialty Hosp—Macomb Co, Inc*, 270 Mich App 383; 715 NW2d 72 (2006) over the right of the successor personal representative to rely on the notice of intent served by his predecessor, while distinguishing *Halton v Fawcett*, 259 Mich App 699; 675 NW2d 880 (2003).

On September 8, 2006, the full Court of Appeals voted to convene a conflict resolution panel under MCR 7.215(J)(3)(a), and gave all appellants 21 days in which to file supplemental briefs. Meanwhile, GCH also sought rehearing as to the unanimous panel ruling that it failed to preserve the notice of intent issue for review.

On June 5, 2007, the special panel issued its unanimous decision, Apx 53a-60a ("*Braverman II*"), holding that the reference in MCL 600.2912b to "the person" means, in the case of a personal representative, either a personal representative or a successor personal representative, as the Estates and Protected Individuals Code commands, *e.g.*, MCL 700.1106(n); 700.3613 and 700.3701.

After the conflict resolution panel's decision, GCH's motion for rehearing was submitted to the original 3-judge panel, which denied rehearing on July 18, 2007. GCH claims (GCH

Brief, p. vi) that it is not now raising that issue (which is held in abeyance in GCH's separate application for leave to appeal), but of course that is merely a pretext for GCH to skirt its failure to preserve Issue II for review, even if the other appellants did so.

ARGUMENT

Issue I: Where suit for medical malpractice/wrongful death is filed by a successor personal representative within two years of the date of appointment, and less than three years after the period of limitation would otherwise have run, the circuit court correctly denied summary disposition based on the statute of limitations.

Counterstatement of the Standard of Review

Appellate review of summary disposition rulings is de novo. *Adair v State,* 470 Mich 105, 119; 680 NW2d 386 (2004).

When reviewing a grant or denial of summary disposition pursuant to MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the light most favorable to the party opposing summary disposition—in plaintiff's favor, in this case. *Maiden v Rozwood,* 461 Mich 109, 119; 597 NW2d 817 (1999), citing MCR 2.116(G)(5); *Brennan v Edward D Jones & Co,* 245 Mich App 156, 157; 626 NW2d 917 (2001). Provided no factual disputes exist[1] and reasonable minds cannot differ on the legal effect of the facts, whether the statute of limitations bars a plaintiff's claim is a question of law that is then reviewed de novo on appeal. *Brennan, supra.*

The pleading of the statute of limitations by defendants is an affirmative defense, and the burden of proving it is on them; defendants are required to prove the facts essential to effectuate the bar of the statute of limitations. *Tumey v City of Detroit*, 316 Mich 400, 410, 25 NW2d 571 (1947).

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[1] If there were a question of fact, it would in any event be error to grant summary disposition, as such question would be for the jury to resolve. *Kermizian v Sumcad*, 188 Mich App 690, 694; 470 NW2d 500 (1991).

Where, as here, the underlying issue concerns the construction and implementation of a statute of limitations or applicable provisions of the Estates and Protected Individuals Code, appellate review of the interpretation and application of a statute presents questions of law also subject to de novo determination. *Miller v Mercy Mem Hosp,* 466 Mich 196, 201; 644 NW2d 730 (2002).

A statute of limitations and a statute tolling the limitations period or creating an exception to its operation stand on equal footing, and the process of harmonizing such statutes requires careful judicial and judicious balancing. *Stephens v Dixon,* 449 Mich. 531, 536; 536 NW2d 755 (1995). Case law "liberally construes" tolling provisions to allow litigation of the merits of claims of which—as here—the defendant had timely notice. *Lausman v Benton Twp,* 169 Mich App 625, 630; 426 NW2d 729 (1988) citing *Affiliated Bank of Middleton v American Ins Co,* 77 Mich App 376, 379; 258 NW2d 232 (1977).

Preservation of the Issue

GCH did raise this issue in its motion for summary disposition and its application for leave to appeal to the Court of Appeals. This issue, alone, is therefore preserved by GCH for review by this Court.

Substantive Analysis

As will be shown below, GCH's argument relies entirely on *ipse dixit*, contending—without statutory or case law support—that the two-year period a personal representative has under MCL 600.5852 in which to file a suit for wrongful death/medical malpractice means "two years during which [an estate] is represented by a personal representative to file a case (assuming it is within the three year ceiling)." (GCH's brief, pp. 8, 12-14). Of course, that perversion of the statutory language of MCL 600.5852 was flatly and unanimously rejected by this Court in

Eggleston v Bio-Medical Applications of Detroit, Inc, 468 Mich 29, 33; 658 NW2d 139 (2003).

GCH's position also depends ineradicably (GCH's brief, pp. 10-11) on the notion that, for personal representatives in the position of Grace Fler, who issued notice of intent after *Omelenchuk v City of Warren*, 461 Mich 567; 609 NW2d 177 (2000) and less than 182 days after the decision in *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (April 14, 2004), there was no tolling of the 2-year period under MCL 600.5852. GCH's position is completely invalidated by this Court's decision in *Mullins v St Joseph Mercy Hosp*, ___ Mich ___; ___ NW2d ___ (S Ct No 131879, November 28, 2007).

GCH attempts to declare *Mullins* inapposite, on grounds that *Mullins* only covers situations in which "two years had elapsed since the personal representative was appointed, sometime between the date that *Omelenchuk* was decided and within 182 days after *Waltz* was decided." October 13, 2004 was 182 days after *Waltz*; Grace Fler's two-year anniversary of appointment would have been October 29, 2004. Alas for GCH, however, Grace Fler was removed as personal representative on August 17, 2004, and Eric Braverman was appointed successor personal representative on August 18, 2004, so Ms. Fler's two-year anniversary became irrelevant. Ms. Fler had already relied on *Omelenchuk* in timing her notice of intent, which was issued July 8, 2004, after diligent investigation of the facts (as required by MCR 2.114(D) and (E), as well as MCL 600.2591).

Turning to ancillary arguments, there is no dispute but that the period of limitations for medical malpractice claims is two years. MCL 600.5805(6). The two year period is measured from the date of the act giving rise to the claim, here, April 19, 2000. MCL 600.5838a(1). Thus, but for Patricia Swann's death on February 18, 2002, the period of limitations in this matter would have expired as to GCH on April 19, 2002.

However, where the patient/claimaint, Patricia Swann, dies prior to expiration of the period of limitations, or within 30 days thereafter, the personal representative of the patient/claimant's estate has two years from the date of appointment in which to file suit, but not more than three years past the expiration of the original limitations period. MCL 600.5852. In this case, Patricia Swann died prior to the expiration of the period of limitations.

Eric Braverman, as successor personal representative, had two years from his appointment on August 18, 2004, but not more than 5 years from the date of the alleged malpractice, in which to file this lawsuit. MCL 600.5852; *Eggleston v Bio-Medical Applications of Detroit, Inc, supra*, 468 Mich at 30-33. Here, suit was filed on January 25, 2005, long before 5 years from the date of the alleged act of malpractice, and well before two years elapsed after Mr. Braverman's appointment (August 18, 2004), making any reliance on the statute of limitations utterly fatuous. Indeed, in the Appendix to his concurrence in *Woodard v Custer*, 476 Mich 545, 589; 719 NW2d 842 (2006), Justice Markman posited "majority support for the following propositions", *id.* at 586, including:

> (13) A successor personal representative has two years after appointment to file an action on behalf of the estate as long as the action is filed within three years after the period of limitations has run. MCL 600.5852; *Eggleston v Bio-Medical Applications of Detroit, Inc,* 468 Mich 29; 658 NW2d 139 (2003).

GCH, however, asks this Court to accept its revisionist perversion of *Eggleston* that contradicts not only the express terms of this Court's *Eggleston* opinion, but which contravenes GCH's own express concession before the circuit court (Apx 252a-254a) that the reasons for replacing the original personal representative are irrelevant. *Eggleston* clearly holds that where a successor personal representative is appointed and files suit within two years of that appointment, but less than 3 years after the period of limitations would "otherwise have run", the suit is timely. *Period.*

GCH, with no basis in the record (thus, contrary to MCR 7.306(A) and MCR 7.212(C)(7)), attempts to impute some nefarious basis for the probate court's appointment of a successor personal representative, and urges that policy considerations—asserted in an effort to judicially circumvent MCL 600.5852, as construed in *Eggleston*—somehow should prompt this Court to do what *Roberts v Mecosta Gen Hosp*, 466 Mich 57, 58; 642 NW2d 663 (2002) and *Halloran v Bhan*, 470 Mich 572, 579; 683 NW2d 129 (2004), expressly forbid, and just what this Court refused to sanction in *Eggleston*, namely, judicially create exceptions to MCL 600.5852 for all cases involving a successor personal representative except those in which the original PR dies, or the equivalent (GCH's brief, pp. 13-14). The correct reading of MCL 600.5852 in *Eggleston* and Justice Markman's *Woodard* concurrence properly preclude this strained attempt to judicially rewrite the statute. Const 1963, art 3, §2; art 4, §1.

At the threshold, however, it must be forcefully noted that any intimation that Grace Fler was replaced as personal representative for some illegitimate reason or skullduggerous purpose is utterly without foundation. There is nothing—not a shred[2] of evidence of any kind—in the circuit court record, or in the documentary materials submitted with the application, to substantiate such baseless speculations. For its part, the circuit court properly relied on the Probate Court's unappealed orders removing Ms. Fler and appointing Mr. Braverman as successor personal representative. The appointment or reappointment of personal representatives is a matter within the Probate Court's *exclusive* jurisdiction, MCL 700.1103(j); MCL 700.1302(a) and (d).

[2] Nor a scintilla, iota, molecule, atom, or subatomic particle or any kind.

Whether to appoint a successor personal representative and whom to so appoint were issues *exclusively* confided to the probate court, whose decision has not been directly appealed[3], and whose decision thus cannot be challenged or attacked collaterally in this separate action, which is being litigated in circuit court. As was held in *Adams v Adams*, 304 Mich 290, 293; 8 NW2d 70 (1943) (emphasis added):

> It is urged by defendant that he may collaterally attack the validity of the probate proceedings. The general rule is that the proceedings of a court can be attacked collaterally if the court never acquired jurisdiction of the subject matter or the persons involved. It is also the rule that **when the court has acquired jurisdiction, its proceedings may be attacked only directly by appeal or by a bill in equity.** See, *McMann v General Accident Assurance Corp*, 276 Mich 108; 267 NW 601. **In the case at bar defendant may not collaterally attack the proceedings in the probate court.**

Accord: Cleveland v Second National Bank & Trust Co, 354 Mich 202, 219-222; 92 NW2d 449 (1958); *Riebow v Ensch*, 220 Mich 450, 454; 190 NW 233 (1922); *Thompson v Thompson*, 229 Mich 526, 531-532; 201 NW 533 (1924); *Chapin v Chapin*, 229 Mich. 515, 519 ff; 201 NW 530 (1924). Therefore, the Court must reject any attempt by GCH to accomplish by indirection and collateral attack what is prohibited to it even on direct appeal.

In this case, identically to *Eggleston*, Ms. Fler had less than two full years in which to file suit after her appointment, so even if the Court were disposed to judicially carve out an exception to MCL 600.5852, it would not avail GCH. To review the facts, Ms. Fler's letters of authority empowering her to act as personal representative were issued on October 29, 2002 (Apx 71a); Ms. Fler was removed on August 17, 2004 (Apx 73a). August 17, 2004 is less than two years

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[3] Note that direct appeal would be to the Court of Appeals, not circuit court. MCR 5.801(B)(1)(a). The time for appeal of right expired on September 18, 2004, MCR 7.203(A)(1), and the time for seeking delayed appeal by application elapsed on August 18, 2005, MCR 7.205(F)(3). **Of course, GCH has absolutely no standing to contest Mr. Braverman's appointment, by direct appeal or otherwise.** MCR 5.125(C)(2).

after October 29, 2002, so here, as in *Eggleston*, the original personal representative did not have the benefit of a full two year period in which to file suit.

Nonetheless, GCH contends that, even though the original personal representative had less than two years between date of appointment and date of replacement in which to file suit, the successor personal representative does not have two years under MCL 600.5852 in which to file suit. It relies on an unpublished decision of the Court of Appeals, *King v Briggs* (Mich App Nos 259136 and 259229, released July 12, 2005).

The decision in *King v Briggs* was wrong, but in any event it is readily distinguishable. In *King*, the Court of Appeals purported to distinguish *Eggleston, supra*, because in *King* the original personal representative actually filed suit, albeit more than two years after the date of appointment. Citing MCL 700.3613, the *King* panel reasoned that the successor had to be substituted in that action, and it then concluded that "the successor representative here must be substituted in the action already commenced and does not have an additional two years under MCL 600.5852 to pursue the malpractice claim." In that regard, *King* is identical to *McMiddleton v Bolling*, 267 Mich App 667, 672-673; 705 NW2d 720 (2005)[4].

MCL 700.3613 provides:

> The appointment of a personal representative to succeed a personal representative who appointment is terminated is governed by parts 3 and 4 of this article. After appointment and qualification, a successor personal representative must be substituted in all actions and proceedings in which the former personal representative was a party. A notice, process, or claim that was given or served upon the terminated personal representative need not be given to or served upon the successor personal representative in order to preserve a position or right the person that gave the notice or filed the claim may have

[4] And dismissal of the first such suit on limitations grounds would then be res judicata and bar any subsequent suit, whether by a successor Personal Representative or otherwise. *Al-Shimmari v Detroit Medical Center*, 477 Mich 280; 731 NW2d 29 (2007); *Washington v Sinai Hosp of Detroit*, 478 Mich 412; 733 NW2d 755 (2007). Here, no suit was ever commenced by Grace Fler and so there was, and could have been, no prior dismissal on the merits.

> obtained or preserved with reference to the former personal representative. **Except as the court otherwise orders, the successor personal representative has the powers and duties in respect to the continued administration that the former personal representative would have had if the appointment had not been terminated.**

Nowhere in MCL 700.3613 is there any language revoking MCL 600.5852, which provides:

> If a person dies before the period of limitations has run . . . an action which survives by law may be commenced by the personal representative of the deceased person at any time within 2 years after letters of authority are issued although the period of limitations has run. But an action shall not be brought under this provision unless the personal representative commences it within 3 years after the period of limitations has run.

MCL 600.5852 is unambiguous in this regard, *Eggleston, supra*, and must be applied as written. Meanwhile, note that in this case, unlike *McMiddleton*, there is no substitution, because Mr. Braverman filed this lawsuit himself; he is not seeking to take over a lawsuit filed by Ms. Fler.

King v Briggs is contradicted both by unpublished decisions, most recently *Braverman v Wm Beaumont Hosp* (Mich App No 268106, released Aug. 28, 2007), slip op pp. 5-7 (Attachment 1 per MCR 7.215(C)(1)), and published decisions, *e.g.*, *Verbrugghe, supra*, at 392 and *Carmichael v Henry Ford Hosp*, 276 Mich App 622, 626-629; ___ NW2d ___ (2007).

Note that, in its essence, GCH's position is precisely that taken by the Court of Appeals in *Eggleston, supra*, 248 Mich App 640, 649; 645 NW2d 279 (2001), which this Court unanimously rejected and reversed as an incorrect reading of the plain language of MCL 600.5852. And, to the extent GCH relies on *Lindsey v Harper Hosp.*, 455 Mich 56, 66; 564 NW2d 861 (1997) for a purported narrowing construction of MCL 600.5852 and *Eggleston*, it cannot circumvent *Miller v Mercy Memorial Hosp, supra*, 466 Mich at 202-203, where, applying *Lindsey*, this Court itself gave MCL 600.5852 an expansive construction consistent with its unambiguous terms.

This Court's *ratio decidendi* in *Eggleston*, 468 Mich at 33, is an archetypal exemplar of simplicity and brevity that admits of no exceptions to MCL 600.5852, still less any exception that GCH might invoke here:

> * * * The statute simply provides that an action may be commenced by the personal representative "at any time within 2 years after letters of authority are issued although the period of limitations has run." *Id.* The language adopted by the Legislature clearly allows an action to be brought within two years after letters of authority are issued to the personal representative. The statute does not provide that the two-year period is measured from the date letters of authority are issued to the initial personal representative.
>
> Plaintiff was "the personal representative" of the estate and filed the complaint "within 2 years after letters of authority [were] issued," and "within 3 years after the period of limitations ha[d] run." MCL 600.5852. The action was therefore timely.

What GCH asks this Court to do here is to judicially manufacture an exception to MCL 600.5852 that the Legislature chose not to create. The unconstitutional evil in GCH's invitation to judicial legislation—see Const 1963, art 4, §1 (the legislative power of the State is vested in the Legislature) and art 3, §2 (separation of powers, barring the judiciary from exercising legislative powers)—was acerbically identified—and duly chastised—in *Roberts v Mecosta Gen Hosp, supra*, 466 Mich at 58, also a medical malpractice case in which this Court pointedly noted:

> This case again calls into question the authority of courts to create terms and conditions at variance with those unambiguously and mandatorily stated in a statute. We reaffirm that the duty of the courts of this state is to apply the actual terms of an unambiguous statute.

As this Court, in like vein, commented in *Halloran v Bhan, supra*, 470 Mich at 579, also a malpractice case:

> There is no exception to the requirements of the statute and neither the Court of Appeals nor this Court has any authority to impose one. As we have invariably stated, the argument that enforcing the Legislature's plain language will lead to unwise policy implications is for the Legislature to review and decide, not this Court. [FN7 omitted] See *Jones v Dep't of Corrections,* 468 Mich 646, 655; 664 NW2d 717 (2003).

Any competent student of the appellate process expects that, where this Court that sits at the apex of Michigan's "one court of justice", Const 1963, art 6, §1, and decides only about 50 cases on leave granted in a calendar year, as it did in 2006, each will find application to a wide variety of lower court matters. Thus, GCH's assertion (GCH's brief, p. 13) that there are "numerous cases" in which *Eggleston* issues have been raised is utterly meaningless. Were it otherwise, GCH would have to criticize this Court for doing a poor job of selecting the cases in which is grants plenary review. It should not be surprising that in the four years since *Eggleston* the Court of Appeals has cited the decision in some 179 cases (per Westlaw®).

But in any event, *King*, even if it had been correctly decided, is clearly distinguishable. By its terms, *King*, like *McMiddleton*, only applies when the original personal representative actually filed suit beyond two years from the date of appointment, and the successor personal representative attempts to carry on that same lawsuit. **Here, the original personal representative did not file suit, being replaced before she could have done so effectually given the requirements of MCL 600.2912b** (as GCH itself notes, GCH's brief, p. 11; **this lawsuit was filed by the successor personal representative, and is the only lawsuit filed after the mandatory waiting period of MCL 600.2912b expired**. This case is therefore identical to *Eggleston* and unlike *King* or *McMiddleton*, so *Eggleston* controls.

Per *Eggleston* and MCL 600.5852, this lawsuit was timely commenced within the extended period of limitations, as the original Court of Appeals panel unanimously determined in its August 6, 2006 decision herein, *Braverman I,* 272 Mich App at 76 (Apx 43a-45a).

Issue II: Assuming such an issue is properly raised by GCH, the circuit court correctly permitted suit by a successor personal representative to proceed, where notice of intent per MCL 600.2912b was properly and timely served by counsel for the estate at the behest of the original personal representative.

Counterstatement of the Standard of Review

This issue arises from summary disposition, and involves statutory construction, thus requiring de novo review on both grounds. *Adair v State, supra*; *Miller v Mercy Mem Hosp, supra.*

In like vein, where, as here, the underlying issue concerns the construction and implementation of MCL 600.2912b or applicable provisions of the Estates and Protected Individuals Code, review of the interpretation and application of a statute presents questions of law also subject to de novo determination. *Miller v Mercy Mem Hosp, supra,* 466 Mich at 201.

Preservation of the Issue

GCH has the burden of demonstrating that it preserved this issue. MCR 7.306(A), incorporating MCR 7.212(C)(7) ("Page references to the transcript, the pleadings, or other document or paper filed with the trial court must also be given to show whether the issue was preserved for appeal by appropriate objection or by other means."). Whether an issue has been preserved for appellate review is an issue of law. *Bitar v Wakim*, 456 Mich 428, 435 n. 2 (plurality opinion), 435 (Mallett, CJ, concurring); 572 NW2d 191 (1998); *Lawrence v Darrah & Associates,* 445 Mich 1, 4, n. 2; 516 NW2d 43 (1994).

The meaning and scope of pleadings, such as affirmative defenses, is confided to a trial court's sound discretion, and may be reconsidered on appeal only when there has been an abuse of that discretion. *Dacon v Transue*, 441 Mich 315, 328-329; 490 NW2d 369 (1992).

GCH Failed to Preserve this Issue for Appellate Review

Here, the original hearing panel construed GCH's pleadings as failing to preserve the issue of the successor personal representative's right to rely on the notice of intent filed by the original personal representative, or alternatively concluded that GCH waived any such issue by its subsequent actions, and that ruling thus can be set aside only if it represents an abuse of discretion. In that regard, the hearing panel was unanimous that GCH had not preserved the issue; Judge Zahra dissented only as to considering the issue for the benefit of *other defendants*.

This issue and argument were raised for the first time in GCH's Brief on Appeal, but was not addressed in GCH's application for leave to appeal to the Court of Appeals[5]. Hence, the attempt to now present this issue—*viz.*, that Eric Braverman cannot file a lawsuit for medical malpractice because he, personally, has not given notice of intent as required by MCL 600.2912b—is in direct violation of MCR 7.205(D)(4) and the terms of the Court of Appeals' order granting leave to appeal. *Preston v Dep't of Treasury*, 190 Mich App 491, 498; 476 NW2d 455 (1991); *Ligget Restaurant Group, Inc v. Pontiac,* 260 Mich App 127, 139 n. 37; 676 NW2d 633 (2003).

Moreover, this issue was never presented by GCH to the trial court. GCH's motion for summary disposition does not contain even a passing reference to this issue (Apx 138a-146a), nor did GCH's reply in support of summary disposition (Apx 216a-221a). At oral argument of

[5] MCL 600.2912b was cited in GCH's application for leave to appeal to the Court of Appeals only in its Statement of Facts, p. 2. No substantive argument was predicated on the statute or on *Roberts v Mecosta Gen Hosp, supra,*, which was cited by GCH in support of its new issue for the first time in its brief on appeal. Nor was there any reference to the issue in the Statement of Questions Presented section of GCH's Application for Leave to Appeal to the Court of Appeals. An issue must be both specified in the Statement of Questions Presented and then adequately supported with cited authorities and analysis within the Argument portion in order to be raised on leave granted. MCR 7.212(C)(5); MCR 7.205(D)(3); *Ypsilanti Fire Marshal v Kircher (On Reconsideration),* 273 Mich App 496, 553; 730 NW2d 481 (2007); *English v Blue Cross Blue Shield of Michigan*, 263 Mich App 449, 459; 688 NW2d 523 (2004).

its motion in circuit court, GCH's counsel never once adverted to this issue (Apx 250a-523a), nor did Judge Curtis ever rule on such an argument (Apx 257a). Appellate review is limited to issues actually decided by the lower court, *Michigan Mut Ins Co v American Community Mut Ins Co*, 165 Mich App 269, 277; 418 NW2d 455 (1987). Thus, even if GCH had at some time actually raised this issue, appellate review would be precluded because there has been no ruling thereon as to which GCH is "aggrieved" as required by MCR 7.203(A)[6]. *Dep't of Consumer and Industry Services v Shah,* 236 Mich App 381, 385; 600 NW2d 406 (1999), and cases there cited.

This issue is one which GCH could not raise on appeal to the Court of Appeals without a motion under MCR 7.216(A)(3). MCR 7.205(D)(4). GCH filed no such motion. Appellee Braverman should be awarded costs and attorney fees for having to respond to this improper argument. MCR 7.316(D).

Elsewhere (in its separate application for leave to appeal, held in abeyance by this Court) Garden City Hospital asserted that it preserved the issue by the following boilerplate[7] "affirmative defense" #10:

> Plaintiff failed to appropriately give notice of suit to the Defendants and that the Michigan Statute in such case made and provided requires that Plaintiff give at least 182 day as notice prior to filing of suit and that Plaintiff's failure to give such notice renders the Plaintiff's filing of the action invalid and Plaintiff's Complaint is therefore subject to being dismissed for failure to comply with the applicable statute.

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[6] Of course, MCR 7.203(A), which facially appears to apply only to appeals of right, applies to appeals on leave granted because, if leave is granted, as it was here, "the case proceeds as an appeal of right". MCR 7.205(D)(3).

[7] In this era of word processors and computers with sophisticated word processing software, the "cutting and pasting" of generically phrased "affirmative defenses", with no relationship to the facts of a particular case and without limitation to only those that are actually pertinent, should not be considered on par with affirmative defenses which rely on specific facts. The Michigan Court Rules are clear that an affirmative defense must be based on facts, not blanket assertions of defenses by description or name. MCR 2.113(F)(3) ("Under a separate and distinct heading, a party must state the facts constituting (a) an affirmative defense * * *"). GCH's iteration of affirmative defenses identified not one single fact and so was entirely nugatory.

Nothing therein suggests that GCH was focusing, in any way, shape, or form, on the fact that notice of intent had been given by Grace Fler more than 182 days previously, but that suit was being filed and prosecuted by Eric Braverman without issuing a supposedly prerequisite new notice of intent. As GCH's own phrasing reveals, however, in contravention of the requirements of MCR 2.113(F)(3)(a) no fact was pleaded, and thus the affirmative defense was not "well pleaded" and preserved nothing. A pleading which fails to " 'state . . . the facts, without repetition, on which the pleader relies' " and also to state " 'the specific allegations necessary reasonably to inform the adverse party' " of the pleader's claims is a nullity. *Dacon v Transue, supra*, 441 Mich at 329.

But even assuming for the sake of argument that GCH somehow preserved the issue, its subsequent actions clearly waived it. As the Court of Appeals 3-judge panel correctly and unanimously determined, GCH waived this issue twice: first, by asserting in its motion for summary disposition that "Plaintiff failed to wait the 154 days from the time of serving *his* Notice of Intent to Sue . . ." (emphasis added) (Apx 140a, ¶6) and, second, by conceding that Mr. Braverman filed Notice of Intent, first in GCH's motion for summary disposition ("Plaintiff did serve a Notice of Intent to Sue on July 8, 2004"—Apx 140a, ¶7) and then twice more in GCH's brief in support of summary disposition ("Admittedly, Plaintiff filed a Notice of Intent to Sue on July 8, 2004." (Emphasis added) (Apx 144a and 145a). These quotations put the lie to GCH's subsequent assertion that "it was, at worst, silent at the Trial Court motion level" on this issue (GCH's separate Application in No. 134750, p. 10).

Having thus expressly and repeatedly conceded that Eric Braverman ("Plaintiff") filed notice of intent to sue on July 8, 2004, more than 182 days before suit was filed, GCH by its

actions waived its improperly pleaded affirmative defense. *Klas v Pearce Hardware & Furniture Co,* 202 Mich 334, 339-340; 168 NW 425 (1918).

Waiver may be implied by conduct inconsistent with the intent to assert a right. 28 Am Jur 2d, Estoppel and Waiver, § 209, pp. 612-613. The party waiving the right must have actual or constructive knowledge of facts that would create the right. *Id.,* § 202, pp. 607-608. Here, GCH at the time of its motion for summary disposition clearly had actual knowledge of its own answer and affirmative defenses and that Grace Fler and Eric Braverman are not the same individual.

Not only should the hearing panel's decision that GCH waived the issue be affirmed or otherwise left undisturbed, but plaintiff should be awarded actual costs and attorney fees for all aspects of this exercise engendered by GCH's improper litigation tactics, especially given GCH's misrepresentation of its prior statements conceding the notice issue as "silence". MCR 7.316(D).

Substantive Analysis

At the outset, the Court should note the glaring contradictions in GCH's legal argument (if it can be so dignified) of Issues I and II. In its Issue I, GCH contends that all statutory language relating to a "personal representative" should be understood as encompassing "the office of the estate" (GCH's brief, pp. 16-19). Yet GCH turns around in its Issue II and contends that, notwithstanding that the statutory definition of "personal representative" in MCL 700.1106(n) (which GCH would have this Court supplant with a judicial definition more to its liking, contrary to fundamental constitutional principles per *Carr v General Motors Corp*, 425 Mich 313, 318; 389 NW2d 686 (1986)) expressly embraces "successor personal representative", notice of intent under MCL 600.2912b must be served by the same individual (as though the personal representative were acting personally, rather than as an agent of a disclosed principal)

as the individual who files suit for the benefit of the decedent's estate under MCL 700.3715(x)—see GCH's brief, p. 30

GCH also parses the actual Notice of Intent at some length (GCH's brief, pp. 29-30) as a prelude to asserting that it was served by Grace Fler, not Eric Braverman—directly contradicting its *quadruple* concession to the contrary in its own motion for summary disposition and brief in support (Apx 140a, ¶¶6 and 7, 144a and 145a).

In an argument that can only be regarded as fatuous and frivolous, representing the epitome of pettifoggery, GCH contends that, under MCL 600.2912b, the successor personal representative, Mr. Braverman, could not rely on the notice of intent served by his predecessor, Ms. Fler, but had to repeat the process[8]—to no cognizable substantive purpose whatever. These contentions are devoid of even arguable merit.

MCL 600.2912b provides:

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[8] And also repeat the 182 day waiting period, which, in other circumstances, would mean that no complaint could be filed within the period of limitations, because the serving of notice of intent after the original two-year period of limitations has elapsed does not toll the limitations clock (precisely what GCH argues on p. 11 of its brief), *Waltz v Wyse*, 469 Mich 642; 677 NW2d 813 (2004), yet suit cannot be prematurely filed prior to expiration of the 182 day period, *Halloran v Bhan*, *supra*, thus potentially trapping a plaintiff into being unable to ever file a timely complaint. Indeed, if GCH had its way here, the successor personal representative would be required to re-serve notice of intent, and, now that interlocutory appeal has pushed things past the 5-year outer limit of MCL 600.5852, GCH would delight in the expectation of thus wholly immunizing itself from any liability for malpractice not by vindication on the facts, but by delay and distraction.

Sadly, this reflects how medical malpractice litigation by the defense has become an exercise in gamesmanship, utterly divorced from a search for truth or justice—just the sort of Gordian procedural imbroglio the people of Michigan sought to avoid when they empowered this Court, Const 1963, art 6, §5, rather than their Legislature, to make rules of practice and procedure. *Guastello v Citizens Mut Ins Co*, 11 Mich App 120, 133 ff; 160 NW2d 725 (1968). Michigan's judiciary should not allow itself to be transformed from "one court of justice", Const 1963, art 6, §1, into a Jarndyced caricature of a court of justice epitomized by the warning chalked over the door of the English court in Charles Dickens' *Bleak House*: "Suffer any wrong that can be done you, rather than come here!" (*Bleak House*, p. 17).

> Except as otherwise provided in this section, a person shall not commence an action alleging medical malpractice against a health professional or health facility unless the person has given the health professional or health facility written notice under this section not less than 182 days before the action is commenced.

GCH's analysis would have this Court ignore or pervert MCL 700.3701[9], which in relevant part provides:

> * * * A personal representative may ratify and accept an act on behalf of the estate done by another if the act would have been proper for a personal representative.

Thus, Eric Braverman could and did properly avail himself of the notice of intent served by his predecessor. Mr. Braverman thus was expressly authorized by MCL 700.3701 to ratify and accept as his own, with full retroactive effect, an act done by Ms. Fler—no contention is or could be made that Ms. Fler's issuance of notice of intent under MCL 600.2912b was anything but an act "proper for a personal representative".

Further affirmation—if any were needed—of the fact that a personal representative's "relation back" powers are not limited to acts done by *any* particular individual prior to appointment flows from the "fundamental rule" of statutory construction that every word of a statute must be given meaning, and no part of the statute may be treated as surplusage or nugatory. *Bailey v Oakwood Hosp and Med Ctr*, 472 Mich 685, 706-707; 698 NW2d 374 (2005); *Wickens v Oakwood Healthcare Sys*, 465 Mich 53, 60; 631 NW2d 686 (2001). The subject matter addressed in MCL 700.3701 is the timing and effectiveness of a personal representative's efforts to exercise his or her powers; every sentence of the section, but

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[9] In the Court of Appeals, neither GCH nor the Providence Defendants so much as cited this controlling statute in connection with their briefing of this issue (The Providence Defendants did cite the statute on p. 13 of their brief, but their discussion of the notice of intent issue began on p. 23, so the statute was entirely ignored by them in connection with the one issue which it clearly controls). Now GCH makes passing references on pp. 33 and 34 of its Brief.

especially the second and fourth, clarifies the first (introductory) sentence and addresses "relation back", either in terms or by virtue of both context and use of the past tense.

This proper reading of MCL 700.3701—advocated by plaintiff-appellee and adopted by the Court of Appeals special panel with complete unanimity, is also consistent with jurisprudential history in this regard. It is an "ancient doctrine" that "whenever letters of administration are granted they relate back to the intestate's or testator's death". *Griffin v Workman,* 73 So.2d 844, 846 (Fla.1954). MCL 700.3701 merely codifies this common law principle. Note also that the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*, is Michigan's version of the Uniform Probate Code, and the Michigan Legislature has expressly instructed the judiciary that one purpose of the enactment of EPIC is to "make the law uniform among the various jurisdictions, both within and outside of this state." MCL 700.1201(e).

In this case, "the person" referenced in MCL 600.2912b is "the personal representative" of the Estate of Patricia Swann, deceased. By law, "the personal representative" means whoever may be personal representative from time to time, MCL 700.3613 and 700.3701, with each successor being entitled to avail him- or herself of any action by a predecessor which is beneficial to the estate.

Moreover, *only* the personal representative may initiate a wrongful death action. MCL 600.2922(2) provides in relevant part:

> (2) Every action under this section shall be brought by, and in the name of, **the** personal representative of the estate of the deceased person. * * *

Thus, as this Court recognized in *Eggleston, supra*, 468 Mich at 32-33, a successor personal representative is "the" personal representative for purposes of MCL 600.5852, which provides that "an action which survives by law may be commenced by the personal

representative of the deceased person at any time within 2 years after letters of authority are issued * * * ".

MCL 600.2912b is, of course, *in pari materia* with MCL 600.2922(2), both being part of the Revised Judicature Act (and more specifically of Chapter 29 of the RJA). Thus, both must be construed and understood in relation to one another. *Jennings v Southwood,* 446 Mich 125, 136-137; 521 NW2d 230 (1994). " 'The object of the rule *in pari materia* is to carry into effect the purpose of the legislature as found in harmonious statutes on a subject.' " 446 Mich at 137, quoting *Wayne Co v Auditor General,* 250 Mich 227, 233; 229 NW 911 (1930). In *Detroit v Michigan Bell Tel Co,* 374 Mich 543, 558; 132 NW2d 660 (1965), the Court stated:

> Statutes *in pari materia* are those which relate to the same person or thing, or the same class of persons or things, or which have a common purpose. It is the rule that in construction of a particular statute, or in the interpretation of its provisions, all statutes relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law, although enacted at different times.... [FN4]]
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> FN4. See also *Dearborn Twp Clerk v Jones* 335 Mich 658, 662, 57 NW2d 40 (1953) ("It is elementary that statutes *in pari materia* are to be taken together in ascertaining the intention of the legislature, and that courts will regard all statutes upon the same general subject matter as part of 1 system."); *Remus v Grand Rapids* 274 Mich 577, 581; 265 NW 755 (1936) ("In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject, or having the same general purpose, should be read in connection with it, as together constituting one law." [citation omitted].).

In *Waltz v Wyse,* 469 Mich 642, 666-667; 677 NW2d 813 (2004), this Court held that MCL 600.2922 is indeed *in pari materia* with MCL 600.2912b as well as MCL 600.5852:

> The purpose of the wrongful death statutory framework is to preserve causes of action, including those based on medical malpractice, which were previously terminated by the death of either the injured party or the wrongdoer under the common law. *Hawkins supra* at 428-429. Similarly, the purpose of § 5852, the saving provision, is to "preserve actions that survive death in order that the representative of the estate may have reasonable time to pursue such actions." *Lindsey, supra* at 66. Under § 5852, the Legislature has deemed two years from the issuance of letters of authority to be a reasonable time, but, in any event, suit must be filed no more than three years from the date the statute of limitations

> on the underlying claim has expired. The saving provision remained unchanged in the face of tort reform; evidencing that the Legislature still considered two years to be a reasonable time in which to pursue wrongful death claims predicated on medical malpractice, subject to the three-year ceiling. Consistently with the rule of *in pari materia*, the aforementioned provisions must be read together with the Legislature's subsequent tort reform measures.

Note that, *inter alia*, MCL 700.3709 provides that "a" personal representative has a right to take possession and control of a decedent's property", but also mandates that "the" personal representative pay taxes on the estate. Thus, while the statutory use of the definite article may indeed sometimes reflect a Legislative policy choice that must be duly implemented by the judiciary, *e.g.*, *Robinson v Detroit,* 462 Mich 439, 462; 613 NW2d 307 (2000), clearly, in this context, the Legislature has not evidenced such an intent, where it has used "a" and "the" in relationship to "personal representative" interchangeably—indeed, both articles are used in MCL 600.2912b.

Alternatively, "the person" as used in MCL 600.2912(b)(1) can only be understood as "the personal representative" by virtue of MCL 600.2922(2), and "the personal representative" necessarily refers to "the successor personal representative" by virtue of MCL 700.3613 and MCL 700.1106(n), who enjoys all "the powers * * * in respect to the continued administration that the former personal representative would have had if the appointment had not been terminated", and who under MCL 700.3701 "may ratify and accept an act on behalf of the estate done by another if the act would have been proper for a personal representative". There can be no question that the giving of notice of intent by Grace Fler under MCL 600.2912(b)(1) was an act that was "proper for a personal representative", and therefore Eric Braverman may ratify and accept that act under MCL 700.3701, and then administer the estate by availing himself of that notice of intent as though the appointment of Grace Fler had not terminated, *i.e.*, as though he himself filed the notice of intent, per MCL 700.3613.

Moreover, MCL 700.3613 requires the substitution of any successor personal representative in all actions and proceedings to which the predecessor was a party. MCL 700.3613 also provides that the successor personal representative stands in the shoes of his predecessor for all purposes, specifically including notice of any kind, and that the successor personal representative "has the powers and duties in respect to the continued administration that the former personal representative would have had if the appointment had not been terminated." One such power of administration is the power to sue or be sued on behalf of the Estate. MCL 700.3715(x).

The contention that a successor personal representative must issue a new notice of intent is the kind of bottom-feeding shysterism and xylocephalic pettifoggery of which the medical malpractice defense bar has recently become enamored, but which is expressly decried and rejected by both the letter and spirit of MCR 1.105. Further, GCH's position contravenes MCR 2.202(B), which provides:

> (B) Transfer or Change of Interest. If there is a change or transfer of interest, the action may be continued by or against the original party in his or her original capacity, unless the court . . . directs that the person to whom the interest is transferred is substituted for . . . the original party.

See also MCR 2.202(D). Here, of course, MCL 700.3613 mandates that the successor personal representative be substituted "in all actions and proceedings in which the former representative was a party." A wrongful death action can only be prosecuted by "the" personal representative. MCL 600.2922(2). The personal representative is therefore "the person" who, *in that representative capacity*, must give notice and file suit for purposes of MCL 600.2912b.

Moreover, MCL 8.3ℓ provides that "person" when used in a statute is not limited to individuals, but applies equally to bodies politic and corporate[10]. Michigan jurisprudence has long held that "person" when used in a statute includes natural as well as juristic persons. *Bush v Sprague*, 51 Mich 41, 48; 16 NW 222 (1883) ("It is not necessary that the "other person" spoken of should be a natural person. An artificial person is equally within the meaning of the statute."). For purposes of a wrongful death action, "the person" can only refer to "the" personal representative, which by virtue of MCL 700.3613 and MCL 700.3701, is terminology embracing all individuals holding that position, past or present, at whatever time may be relevant. Thus, notice of intent served by Grace Fler *as personal representative* is notice of which Eric Braverman, *as successor personal representative*, is entitled to take full advantage per MCL 700.3613 and MCL 700.3701—this lawsuit has been filed by "*the* personal representative" after

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[10] *Halton* engaged in clearly erroneous reasoning by ignoring this statutory definition entirely and resorting instead to common dictionaries. 259 Mich App at 703. A statutory definition, however, always completely supersedes a dictionary definition. *Carr v General Motors Corp, supra*, 425 Mich at 318.

Halton, examining only the statutory definition of "personal representative" in MCL 700.1106(n), also erroneously concluded that "a 'personal representative' is a 'person' rather than a separate legal entity." To the contrary, since a personal representative has the power to sue and be sued, in his or her own name both "for the protection of the estate and of the personal representative in the performance of the personal representative's duties", MCL 700.3715(x), a personal representative is indeed a distinct juristic entity, or, equivalently, has two legally distinct capacities, one as an individual and one as personal representative, with the distinction being substantive rather than a mere matter of form, *e.g.*, *Cotter v Britt* (Mich App No 274776, released May 31, 2007), slip op p 3 (note that, when it is beneficial to them, med-mal defendants are quick to exploit such distinctions, but here they seek to paper them over) (Attachment 2 per MCR 7.215(C)(1)).

Thus, a personal representative separately submits to the jurisdiction of the court upon accepting appointment, and is entitled to all notices. MCL 700.3602. A personal representative also has the same power over property of the estate that an absolute owner would have, MCL 700.3711, and exclusive authority over all competing claimants, MCL 700.3702. Extension of *Halton*'s faulty reasoning, which never cited or considered any of these other EPIC provisions, is thus doomed to lead to erroneous results.

notice of intent was duly served by "*the* personal representative", in full compliance with MCL 600.2912b.

GCH cites *Halton v Fawcett, supra*, 259 Mich App at 704, where the person who gave notice of intent was subsequently appointed personal representative, and where the defendant claimed that the requirements of MCL 600.2912b were not fulfilled. The *Halton* Court disagreed, and correctly so, noting that MCL 600.2912b does not require that notice of intent be given by the personal representative, unlike, say, MCL 600.2922(2). *Halton* made unnecessarily hard work of the analysis by reaching the right result on questionable reasoning involving *obiter dictum*, which the special panel of the Court of Appeals unanimously distinguished and also rejected as *dicta,* but from which GCH seeks to make hay. MCL 700.3701 provides a complete answer to the issue raised in *Halton* ("A personal representative may ratify and accept an act on behalf of the estate done by another if the act would have been proper for a personal representative.").

Halton simply held that the fact the person who filed the complaint was the same human being who filed the notice of intent satisfied the requirements of MCL 600.2912b(1); Halton neither addressed nor considered whether that was the only means of fulfilling the requirements of MCL 600.2912(b)(1). As the original Court of Appeals panel (*Braverman I*) in this case noted (Apx 42a),

> [M]erely because the statutory requirement is met under the circumstances in *Halton* does not preclude a conclusion that the statutory requirement is also met if the person is the same person in a representative capacity.[12]

[12] Logic dictates that the fulfillment of a requirement by one fact does not preclude fulfillment of that requirement by another fact, *i.e.*, merely because a complaint must be filed on a weekday, and Tuesday is a weekday, it does not logically follow that a complaint may not also be filed on Monday, Wednesday, Thursday or Friday, which are also weekdays.

To its further discredit, *Halton* did not cite MCL 700.3701 or any other specific substantive provision of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 *et seq.*; it merely cited EPIC generally in footnote 4 and the statutory definition, MCL 700.1106(n), of "personal representative" in footnote 5. Given the limitations of the issue there presented and *Halton*'s doubtful reasoning, the Court of Appeals special panel in *Braverman II* properly held that *Halton*'s *dictum* should not be extended to analysis of other distinctly different factual scenarios, such as that here presented, which are governed by EPIC[11]. More specifically, *Halton*'s pronouncement that "the person" refers only to a particular human being, was unsupported by authority and, as shown above, is contrary both to MCL 8.3ℓ and to binding Michigan precedent, *Boyd v W G Wade Shows*, 443 Mich 515, 523; 505 NW2d 544 (1993), as well as other controlling statutes.

Verbrugghe, for its part, without analyzing any of the provisions of EPIC, slavishly extended *Halton* to situations like that here presented, declaring in conclusory terms:

> The trial court's final reason for dismissal was that plaintiff's complaint was subject to dismissal because the successor personal representative failed to serve a notice of intent on defendants, citing MCL 600.2912b(1) and *Halton v Fawcett,* 259 Mich App 699, 704; 675 NW2d 880 (2003). The trial court and defendants are correct in this last assertion, as plaintiff herself was required to file or serve a notice of intent before commencing this lawsuit. *Halton, supra.* However, the remedy for this deficiency is a dismissal without prejudice. See *Neal v Oakwood Hosp Corp,* 226 Mich App 701, 715;

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[11] The fact that this Court denied leave to appeal in *Halton*, 471 Mich 912; 688 NW2d 287 (2004), in no way validates *Halton*'s *ratio decidendi*, based on the familiar principle that a correct result will not be disturbed on appeal despite the lower court's reliance on erroneous reasoning. *Mulholland v DEC International Corp*, 432 Mich 395, 411 n. 10; 443 NW2d 340 (1989). Moreover, denial of leave to appeal by this Court—which grants plenary consideration to only some 50 appeals each year—"imports no expression of opinion upon the merits of the case" in any event. *United States v Carver,* 260 US 482, 490; 43 S Ct 181; 67 L Ed 361 (1923); *Frishett v State Farm Mut Auto Ins Co,* 378 Mich 733 (1966)), citing *Malooly v York Heating & Ventilating Corp,* 270 Mich 240, 247; 258 NW 622 (1935), and *Great Lakes Realty Corp v Peters,* 336 Mich 325, 328-329; 57 NW2d 901 (1953). As MCR 7.321(4) declares, "The reasons for denying leave to appeal, required by Const 1963, art 6, §6 and filed in the clerk's office, are not to be published and <u>are not to be regarded as precedent</u>."

575 NW2d 68 (1997) ("[D]ismissal without prejudice" would be the "appropriate sanction for plaintiff's noncompliance with" [MCL 600.2912b(1)]).

270 Mich App at 397. The special panel correctly rejected that flawed misreading of *Halton*.

To apply *Halton* in the fashion advocated by GCH would contravene fundamental jurisprudential principles. As regards MCL 600.2912(b)(1), statutes in derogation of the common law are strictly construed, and may not be extended by implication to abrogate the established rules of the common law. *Nation v WDE Electric Co*, 454 Mich 489, 494; 563 NW2d 233 (1997). Where there is doubt regarding the meaning of a statute which is in derogation of the common law, the statute must be given the construction which makes the least rather than the most change in the common law. *Energetics, Ltd v Whitmill,* 442 Mich 38, 51; 497 NW2d 497 (1993).

Here, the common law of agency clearly permits a principal to act with equal effect through any number of agents, just as if the principal had conducted each transaction directly. *Burton v Burton*, 332 Mich 326, 337; 51 NW2d 297 (1952). And MCL 600.2922(2) provides that, with regard to wrongful death actions, only the personal representative of the decedent's estate may pursue a claim. Meanwhile, MCL 700.1106(n), 700.3613 and 700.3701 provide that a successor personal representative replaces a predecessor and may claim the advantage, to the benefit of the estate, of any act done by the predecessor.

Yet nothing in MCL 600.2912b purports to destroy the law of agency, or even mentions the law of agency. Absent express language to demonstrate beyond cavil that the Legislature intended by its enactment of MCL 600.2912b to abrogate the settled common-law of agency, the statute may not properly be construed to achieve that purpose. Const 1963, art 3, §7; *Rusinek v Schultz, Snyder & Steele Lumber Co*, 411 Mich 502, 507-508; 309 NW2d 163 (1981). This Court has on prior occasions refused to find in statutes dealing with a limited subject (here, that

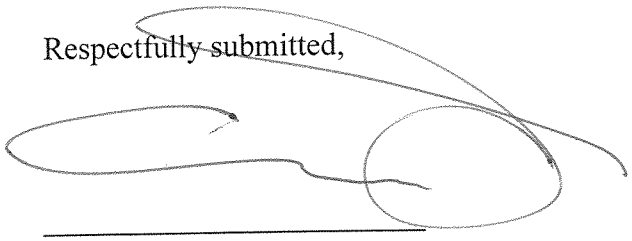
of notice and its content) any legislative intent to abrogate the common law of agency, *Shields v Reddo*, 432 Mich 761, 779; 443 NW2d 145 (1989), or to judicially create exceptions to the common law of agency in other contexts, *Amco Builders & Developers, Inc v Team Ace Joint Venture*, 469 Mich 90, 105-106; 666 NW2d 623 (2003) (" 'That fundamental law of agency does not mutate merely because the viral strain of legal misconduct in a particular case has become so virulent as to constitute "gross" negligence.' ")

Nothing in *Halton* purports to write out of the Michigan Compiled Laws any section of the Estates and Protected Individuals Code, such as MCL 700.3613. Any discussion in *Halton* of the meaning of "the person" in MCL 600.2912b is thus *obiter dictum* as applied to the facts of the present case, where notice was given on behalf of the personal representative in that official capacity by the law firm representing the Estate of Patricia Swann. Importantly, the notice of intent was signed by the law firm of Weiner & Cox, PLC, represented by attorneys Cyril V. Weiner (P26914) and Shalina Kumar (P56595)[12], and the Complaint was both filed and signed by the same law firm in the name of the identical two attorneys. So plaintiff's attorneys could be said to have served notice of intent and to be "the same persons" who filed suit, which independently completely satisfies even the GCH's tortured construction of MCL 600.2912b.

RELIEF REQUESTED

On plenary consideration, the lower courts' denials of summary disposition should be affirmed; in the alternative, leave should be denied as improvidently granted. Appellee should be awarded costs and attorney fees under MCR 7.316(D).

Respectfully submitted,



[12] Now Judge Kumar of the Oakland County Circuit Court.